FIFTH DIVISION
August 19, 2016

No. 1-14-0829



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 07 CR 25180 |
| | ) | |
| KIRK HORSHAW, | ) | Honorable |
| | ) | Mary Margaret Brosnahan, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Gordon specially concurred.

**O R D E R**

¶ 1 *Held*: We affirm the circuit court's order summarily dismissing defendant's *pro se* post-conviction petition over his contention that trial counsel provided ineffective assistance by advancing an alibi defense and thus preventing defendant from raising his theory of self-defense.

¶ 2 Defendant Kirk Horshaw appeals from the circuit court's summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2012). On appeal, defendant contends that he raised an arguable claim that trial counsel was

ineffective for advancing a contrived alibi defense based on perjured testimony, instead of defendant's preferred defense of self-defense. We affirm.

¶ 3 Defendant and codefendant Chancellor Aaron, who is not a party to this appeal, were charged with offenses stemming from the May 7, 2002, shooting death of Aaron Crawford and the shooting of Daniel Wesley. In 2006, codefendant was convicted of Crawford's murder and sentenced to 45 years' imprisonment. *People v. Aaron*, No. 1-06-3187 (2008) (unpublished order pursuant to Supreme Court Rule 23). Defendant was tried separately, as he was not arrested and charged until November 2007. Following a 2011 bench trial, defendant was convicted of the first degree murder of Crawford (720 ILCS 5/9-1(a)(1) (West 2002)) and attempted first degree murder of Wesley (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2002)). He was sentenced to 40 years' imprisonment for murder and a consecutive term of 26 years for attempted murder, both of which included 20-year sentences for personally discharging a firearm during the offenses.

¶ 4 As relevant to this appeal, the evidence at defendant's trial showed that Jamaine Williams testified that he, Crawford, and Wesley were members of the Black Disciples street gang, and defendant and codefendant were members of a rival gang, the Gangster Disciples. The two gangs were involved in a war and would shoot each other on sight. On May 7, 2002, Williams was walking along 71st Street in Chicago when he saw Crawford and Wesley on one side of the street, while defendant, codefendant, and a third man were standing in a vacant lot across the street. An argument ensued between the two groups, and Williams heard Crawford say, "You all going to shoot, shoot." Williams jogged toward Crawford, and, when he was near Crawford and Wesley, defendant and codefendant pulled out their guns and fired multiple shots. Crawford ran in one direction and Williams and Wesley ran in another, taking shelter in a building. Defendant and codefendant then fled the area. When Williams looked out, he saw Crawford lying on the

ground. Williams and Wesley took Crawford to the hospital, but he died of a gunshot wound. Williams spoke to the police shortly after the incident and told them defendant and codefendant shot Crawford. He identified both men in a photo array. Williams did not see Crawford or Wesley with a gun during the shooting.

¶ 5 Daniel Wesley, who was incarcerated in Minnesota for aggravated robbery and had two prior convictions in Illinois for unlawful use of a weapon, testified that on the day of the shooting he had been smoking marijuana and drinking. At about 9 p.m. on the night in question, he was outside on 71st Street when he heard shots and saw Crawford on the ground. Wesley ran and took shelter. When the shooting stopped, Wesley and Williams lifted Crawford into a car and accompanied him to the hospital. Wesley and Williams returned to a restaurant near the scene of the shooting, where police saw them. Wesley told the police he did not know anything, but the police took them to the police station. The detectives separated Wesley and Williams and Wesley testified the police forced Wesley to identify the shooters from a photo array. Wesley acknowledged that he identified defendant and codefendant but explained "it was script," and he was drunk, high, did not know what he was saying, and was just trying to leave the station.

¶ 6 Wesley had previously given a written statement, grand jury testimony, and testimony at codefendant's trial, in which he identified defendant and codefendant as the shooters. His prior statement and testimony were consistent with each other and similar to Williams' account of the shooting. During codefendant's trial, Wesley testified that Crawford did not have a gun during the shooting. The written statement, grand jury testimony, and testimony at codefendant's trial were admitted as substantive evidence at trial.

¶ 7 Karen Luckett testified that she lived next to the site of the shooting. She saw two men get out of a car and identified defendant as one of them. Although she did not see the shooting, she heard the gunshots.

¶ 8 Tiffany Vining a/k/a Tiffany Morgan testified that, at the time of the shooting, she was on drugs and she did not remember the incident. However, Vining's July 2002 written statement to an assistant State's Attorney and a police detective, which was admitted as substantive evidence, indicated that at 9 p.m. on the night in question, she saw Crawford arguing with defendant, codefendant, and a third man she did not know. Codefendant pulled out a gun and "acted like he was going to shoot [Crawford]." After defendant, codefendant, and the third man crossed the street toward a vacant lot, defendant also pulled out a gun and he and codefendant started shooting at Crawford. Crawford never had a gun in his hands.

¶ 9 Donnell Russell testified that he was arrested for possession of cannabis in 2004, and, while at the police station, he told officers he had information about the May 7, 2002 shooting. In particular, he told detectives that on September 6, 2002, he and defendant were driving around searching for marijuana to buy. Russell had not seen defendant for a while and asked where he had been. Defendant responded that he had been "laying low" because he and codefendant were involved in a shooting near 71st Street and Paxton Avenue. Defendant told him that he "caught somebody who shot at him earlier."

¶ 10 Detective John Fassl testified that he and his partner interviewed Wesley and Williams at the police station on the night of the shooting. Both men identified defendant and codefendant as the shooters from a photo array. Fassl denied that Wesley was given any kind of "script," or that he was told who to identify.

¶ 11 Officer Ware testified that on the day after the shooting, he and his partner saw a car that was reported to have been involved in the shooting and attempted to pull it over. A chase followed, during which defendant and codefendant jumped out of the car. The car crashed and the driver, Ricardo Martin, jumped out. Ware and his partner pursued and arrested Martin because he was seen discarding a gun. Defendant and codefendant were subsequently arrested.

¶ 12 Defendant presented four alibi witnesses in his defense at trial: defendant's stepdaughter Jasmine Brooks, family friend Charles Parks, defendant's sister-in-law Clarissa Greer, and defendant's wife Erica Horshaw. All four witnesses testified that defendant was in Georgia on the date of the shooting and served as a pallbearer for a funeral that took place the following day. The defense introduced into evidence a program from the funeral, which listed the date and named defendant as a pallbearer.

¶ 13 The trial court convicted defendant of the first degree murder of Crawford and the attempted first degree murder of Wesley, and sentenced him to an aggregate term of 66 years' imprisonment. We affirmed that judgment on direct appeal. *People v. Horshaw*, 2013 IL App (1st) 111072-U.

¶ 14 On December 11, 2013, defendant filed a *pro se* post-conviction petition, alleging, in pertinent part, that trial counsel provided ineffective assistance by "completely disregard[ing] the defense preferred by [him]," *i.e.*, the defense of self-defense. Instead, defendant asserted that counsel proceeded with his own contrived alibi defense, which "[made] a mockery of the criminal justice system" because counsel "induc[ed] [defendant's] witnesses to commit perjury under the belief that it would benefit [him]."

¶ 15 In so arguing, defendant presented his own version of how the shooting occurred, contending that he shot Crawford in self-defense. He specifically stated in his petition that he

sought out Crawford on the day of the shooting because he wanted to ensure his own safety as there was a war between their rival gangs. Defendant averred that Crawford was a very dangerous man, who had a reputation as a "gunslinger or shooter" for his gang. Crawford had a reputation for carrying guns, being a hot-head, a show-off, and a bold risk taker, who had recently been released from prison. Defendant stated that, due to Crawford's reputation, he and codefendant were armed for their protection on the day of the incident.

¶ 16 When defendant and codefendant approached Crawford, Crawford cursed and warned them, "What [are] you two p*ssy motherf*ckers walking up on me for? You b*tches better push on while you can, because you [are] cruisin' for a bruisin' f*cking with me." Crawford advanced on the two men, swearing, wildly waving his arms, and challenging them to shoot. Defendant admitted that he did not see Crawford with a weapon, but believed there was a strong probability that he could be armed and that defendant was in immediate danger, particularly where other Black Disciples were nearby. Defendant believed he was in immediate danger and at risk of serious harm or death from Crawford. The situation became increasingly volatile as other Black Disciples started to gather around. Defendant and codefendant pulled out their guns and started shooting.

¶ 17 In explaining his actions in shooting Crawford, defendant cited trial evidence showing that the two gangs were engaged in a war, and the testimony of Williams, who confirmed that the gangs would often shoot each other on sight. Defendant also relied on portions of Wesley's recanted grand jury testimony to suggest that Crawford's actions caused him to react in self-defense. In this testimony, Wesley stated, "I observed [defendant] pulling a gun, and I observed [Crawford] yelling at him making gestures towards him. I observed [defendant] and [codefendant] reaching for their waist, pulling pistols out of their waist."

¶ 18 In the appendix to defendant's petition, he admitted he was unable to obtain documentation to support his petition. He specifically indicated that his wife, Erica Horshaw, mailed him an affidavit stating that his trial attorney had her contrive a false alibi to help him, but he never received it as the prison was having problems with its mail system. He claimed he was unable to provide his own affidavit as he failed to get it notarized.

¶ 19 On February 6, 2014, the circuit court summarily dismissed defendant's post-conviction petition as frivolous and patently without merit. In doing so, the court held that even if defense counsel had elected to proceed with defendant's self-defense theory at trial, the result would have been the same. The court specifically found that defendant did not assert that anyone did anything more than shout insults or general threats at him. It further found that defendant admitted that he did not know whether Crawford had a weapon, and, even assuming all of defendant's allegations were true, he could not have reasonably believed he needed to use deadly force to protect himself.

¶ 20 On appeal, defendant contends that the circuit court's dismissal of his *pro se* post-conviction petition must be reversed and the cause remanded for further proceedings as he raised an arguable claim of ineffective assistance of trial counsel. In particular, defendant maintains that defense counsel advanced a contrived alibi defense based on perjured testimony, instead of proceeding on defendant's theory of self-defense or imperfect self-defense. Defendant asserts that counsel's alibi defense that he was in Georgia at the time of the shooting was "facially valueless" where the prosecution adduced several witnesses who placed him at the scene and as one of the gunmen, whereas there was evidentiary support in the record for his self-defense theory.

¶ 21 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction.

725 ILCS 5/122–1 (West 2012). At the first stage of a post-conviction proceeding, the circuit court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill.2d 1, 10 (2009). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Id*. at 11–12; see also *People v. Tate*, 2012 IL 112214, ¶ 9 ("the threshold for survival [is] low"). Our supreme court has held that a petition lacks an arguable basis in fact or law when it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill.2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an indisputably meritless legal theory is one that is "completely contradicted by the record." *Id*. at 16–17. We review the summary dismissal of a post-conviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10. Thus, we review the trial court's judgment, rather than the reasons for its judgment. *People v. Collier*, 387 Ill. App. 3d 630, 634 (2008).

¶ 22 To state a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *i.e.*, deficiency and prejudice. A defendant alleging ineffective assistance of counsel at the first stage of post-conviction proceedings must show it is *arguable* that counsel's performance fell below an objective standard of reasonableness, and *arguable* that defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19 (citing *Hodges*, 234 Ill. 2d at 17). While generally a defendant must overcome the presumption that counsel's actions were the product of sound trial strategy (*People v. Manning*, 241 Ill. 2d 319, 327 (2011)), we do not consider arguments relating to trial strategy when reviewing first-stage post-conviction petitions (*Tate*, 2012 IL 112214, ¶ 22). If a claim of ineffectiveness may be disposed of due to lack of prejudice, a reviewing court is not required to

address whether counsel's performance was unreasonable. *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 46.

¶ 23 As a threshold matter, the State maintains that summary dismissal was proper where defendant failed to attach the necessary supporting affidavits or explain their absence. The general rule is that a defendant must support the allegations in his petition by attaching affidavits, records, or other evidence or explain the absence of such evidence, and that the unexplained absence of such evidence is fatal to the petition. *People v. Collins*, 202 Ill. 2d 59, 66-67 (2002). The purpose of this requirement is to "establish that a petition's allegations are capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at 10.

¶ 24 Here, defendant contends that his alibi witnesses were induced by defense counsel to commit perjury under the belief that it would benefit him. As there is no support for this claim in the record, defendant would have to provide affidavits from his witnesses to support this bare allegation. See *People v. Johnson*, 154 Ill. 2d 227, 240 (1993) (finding that "[a] post-conviction petition which is not supported by affidavits or other supporting documents is generally dismissed without an evidentiary hearing unless the petitioner's allegations stand uncontradicted and are clearly supported by the record"). However, defendant attached no affidavits from his witnesses nor does he satisfactorily explain their absence. He merely stated in the appendix to his petition that his wife sent him an affidavit, but he had not yet received it due to problems with the prison mail system. He does not explain his failure to obtain affidavits from the other witnesses.

¶ 25 Defendant maintains in his reply brief that it would be difficult, or even impossible, to obtain such affidavits from witnesses who perjured themselves at trial. He did not make this argument in his post-conviction petition. We therefore cannot consider it. *People v. Anderson*,

375 Ill. App. 3d 121, 131 (2007). Moreover, it would not be difficult for defendant to obtain affidavits from his witnesses stating that they were *induced* by defense counsel to go along with his contrived defense. There being no evidentiary support for defendant's allegations that counsel proceeded on a contrived alibi defense with perjured testimony, and no satisfactory explanation for its absence, the petition set forth no arguable basis in fact for defendant's claim of ineffective assistance of counsel. We thus find that the lack of any affidavits or supporting documentation supports the summary dismissal of defendant's petition.

¶ 26 Further, assuming *arguendo* that defendant's lack of supporting documentation is not fatal to his petition, and taking the allegations in the petition as true, we find that defendant has not satisfied the prejudice prong of the *Strickland* test, notwithstanding the low standard by which post-conviction petitions are judged at the first stage of proceedings. Even if defendant had pursued his theory of self-defense at trial, it is not even arguable that the outcome would have been different as he did not allege any evidence in his petition that would have supported the affirmative defense of self-defense, or, alternatively, second degree murder based on "imperfect" self-defense as posited by defendant.

¶ 27 In order to raise the affirmative defense of self-defense, the defendant must establish some evidence of each of the following factors:

> " ' (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable.' " *People v. Spiller*, 2016 IL App (1st) 133389, ¶ 22 (citing *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995)).

Self-defense is lawful justification to first degree murder. *Jeffries*, 164 Ill. 2d at 127. In contrast, imperfect self-defense is a form of second degree murder. *Id*. at 113. It occurs when a defendant commits first degree murder and, at the time of the killing, believes the circumstances to be such that, if they existed, would justify or exonerate the killing, but his belief that he was acting in self-defense is objectively unreasonable. 720 ILCS 5/9-2(a)(2) (West 2012); *Jeffries*, 164 Ill. 2d at 113; *People v. Hamon*, 2015 IL App (1st) 122345, ¶ 84.

¶ 28 In the instant case, there was no evidence that Crawford threatened to shoot defendant or codefendant, that he was the aggressor, that defendant was in danger of imminent harm, or that defendant had an actual or subjective belief, reasonable or not, that a danger existed to justify his use of force against Crawford. Although defendant asserts in his petition that he was armed on the date of the incident because Crawford had a violent reputation, he concedes that he was the one who sought out Crawford. Moreover, while defendant asserts that Crawford was calling him names and swearing at him, " '[t]he longstanding rule is that mere threats of personal injury or death do not justify taking the life of the person making the threats when he is doing nothing to put them into execution.' " *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 63 (citing *People v. Felella*, 131 Ill. 2d 525, 534 (1989)). Defendant's petition makes no showing that Crawford was putting any threats into execution.

¶ 29 Nevertheless, defendant asserts in his petition that Crawford's gestures, which included wild arm waves as he advanced upon defendant, indicated that he was armed. For support, defendant relies on Wesley's grand jury testimony in which he stated that he saw Crawford "making gestures" toward defendant. However, defendant readily admits in his petition that he did not see Crawford with any type of weapon, thus corroborating the eyewitnesses' accounts that they did not see Crawford holding a weapon at the time of the shooting. Taking the

allegations in the petition as true, defendant admits he shot Crawford even though Crawford did not brandish a gun and merely insulted defendant and gesticulated wildly. We thus find that defendant's newly-expressed theory of how the shooting occurred did not support a theory of self-defense, or, alternatively, an unreasonable belief in self-defense. Therefore, defendant cannot show he was arguably prejudiced by the fact that no self-defense theory was raised at trial. He therefore cannot meet the prejudice prong of the *Strickland* test to establish ineffective assistance of counsel.

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court summarily dismissing defendant's post-conviction petition at the first stage of proceedings.

¶ 31 Affirmed.

¶ 32 JUSTICE GORDON, specially concurring.

¶ 33 I concur in the judgment only.